Nos. 23A21, 64A21, 442PA20 DISTRICTS 22B, 13A, 12

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Davidson County
	)	
DARRELL TRISTAN ANDERSON	)	
	)	
_____	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Columbus County
	)	
RILEY DAWSON CONNER	)	
	)	
_____	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
JAMES RYAN KELLIHER	)	
	)	
_____	)	

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BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE

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BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Advocates for Justice submit this brief as *amicus curiae* in support of Darrell Anderson, Riley Conner, and James Kelliher.[1]

INTRODUCTION

Darrell Anderson, Riley Conner, and James Kelliher all grew up in unstable environments. Each had early exposure to illicit drugs. Each experienced significant mental health challenges, cognitive impairments, or both. Each pled guilty to crimes committed as juveniles. They felt deep remorse. They began rehabilitating themselves. But–under the sentences imposed in the trial courts–none of them will be parole eligible until they are in their sixties. These sentences are cruel under the North Carolina Constitution because they do not recognize the ways in which children are vulnerable to their environments and capable of change.

James's father physically abused him. James began using alcohol when he was thirteen years old and drinking daily when he was fifteen years old. When he was seventeen, he used ecstasy, acid, psilocybin, cocaine, marijuana, and alcohol. (Kelliher T pp 46–47). As a seventeen-year-old, James and two other juveniles

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[1] Pursuant to Rule 28(i)(2), counsel for *amicus* states that no person or entity other than *amicus*, its members, or its counsel directly or indirectly authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief.

participated in a robbery during which two people were killed. While incarcerated after the crime, James earned his GED, learned Spanish, and pursued a degree in ministry. (Kelliher T p 46). When a pastor who had known James for seventeen years was asked if he was redeemable, the pastor said, "Oh good grief, yes, of course." (Kelliher T p 89).

Darrell's father, while on crack cocaine, choked him when Darrell was as young as five; the father also attacked Darrell and his mother with an axe. (Anderson T pp 22–24, 32). Darrell's father began giving him alcohol when he was around seven years old and later smoked crack cocaine with him. (Anderson T pp 26–30). Darrell had "a low intellectual capacity" and took medication for ADHD that made him act "like he was out of this world." (Anderson R pp 71, 74); (Anderson T p 31). At age seventeen, Darrell participated in a robbery in which two people were killed. After the robbery, Darrell obtained his GED while incarcerated, wrote inspirational books for children, and took courses in upholstery and custodial management. (Anderson T pp 38–39); (Def.'s Ex. A pp 4–15). The trial court thought that Darrell's apology was "one of the most powerful things I've ever heard." (Anderson T p 54).

As a young child, Riley lived in a neighborhood that his aunt called "the pits of hell." (Conner T p 38). The Department of Social Services removed him from his parents' home when he was six years old because of his parents' drug use; he moved between places to live constantly for the rest of his childhood. (Conner T p 39, 45, 150–58). At age eleven, Riley began drinking six or more beers daily and taking

Xanax. (Conner T pp 49, 118, 182, 299). By the time Riley was fifteen years old, he was addicted to marijuana, heroin, opiates, and methadone, some of which he received from a cousin who was ten years older than him. (Conner T pp 118–121). Riley also suffered from chronic frontal lobe epilepsy and had as many as thirty seizures a night. (Conner T pp 114–116). As a fifteen-year-old, he committed murder and rape. After the crime, while in custody, he was in the least-restricted custody level because of his limited infractions and studied for a GED. (Conner T pp 146, 193–95). In a letter, he said, "I know that no amount of words will ever be able to make up for the life that was lost or will . . . bring that person back, but I would still like to say how sorry I truly am." (Conner T p 188).

These three cases raise two key questions. First, under the North Carolina and United States Constitutions, must aggregate sentences for juvenile conduct reflect children's vulnerabilities and capacities for change? Second, does parole eligibility in a person's sixties satisfy the state and federal constitutions?

The Court of Appeals correctly held in *State v. Kelliher* that aggregate sentences for conduct by redeemable juveniles must provide a meaningful opportunity for release and reintegration, and that parole eligibility at age sixty-seven did not constitute a meaningful opportunity for release or reintegration into the community. *State v. Kelliher*, 849 S.E.2d 333, 350, 352 (N.C. Ct. App. 2020), *disc. rev. granted*, 854 S.E.2d 586 (N.C. 2021). The Court of Appeals ordered the appropriate remedy of a sentence that allows for parole eligibility after twenty-five years of incarceration. *Id.* at 352. In contrast, over Chief Judge Linda McGee's

dissent, the Court of Appeals affirmed the constitutionality of sentences not allowing for parole eligibility until age sixty-seven or age sixty to sixty-nine, respectively, in *State v. Anderson*, 853 S.E.2d 797, 798 (N.C. Ct. App. 2020), *notice of appeal filed*, No. 23A21 (N.C. Feb. 4, 2021), and *State v. Conner*, 853 S.E.2d 824, 825 (N.C. Ct. App. 2020), *notice of appeal filed*, No. 64A21 (N.C. Feb. 4, 2021). Amicus asks this Court to affirm the Court of Appeals in *Kelliher*, reverse the Court of Appeals in *Anderson* and *Conner*, and remand the cases for imposition of sentences that make James, Darrell, and Riley eligible for parole after no more than twenty-five years of incarceration.

ARGUMENT

I. THE NORTH CAROLINA CONSTITUTION PROHIBITS CRUEL PUNISHMENTS THAT DO NOT CONSIDER CHILDREN'S UNIQUE VULNERABILITY AND CAPACITY FOR CHANGE.

These cases give the Court a chance to ban punishments that are cruel, and therefore violate the North Carolina Constitution, because they do not reflect children's vulnerability and capacity for change. Darrell, Riley, and James are all incarcerated for crimes that arose out of horrific childhood environments from which the State of North Carolina failed to protect them. Their stories show how children are uniquely vulnerable to abuse, drugs, poverty, mental illnesses, and cognitive impairments; their stories also show how children are uniquely able to rehabilitate themselves, if they are in a safer environment. Nonetheless, if Darrell, James, and Riley serve consecutive sentences, they likely will be in the same position as people who received life without parole–without a meaningful chance of

leaving prison alive. *Cf. State v. Young*, 369 N.C. 118, 126, 794 S.E.2d 274, 279 (2016) (holding that statute allowing Superior Court judges to review sentences and make a non-binding recommendation about commutation to the Governor was not "a sufficiently meaningful opportunity to reduce the severity of the sentence to constitute something less than life imprisonment without the possibility of parole"). Even if Darrell, Riley, and James do leave prison, they will not have a fair chance to find employment, housing, or a meaningful role in the community. Inflicting that outcome on them is cruel.

The North Carolina Constitution gives this Court an opportunity "to provide its people with increased protection" from such cruel punishments. Harry C. Martin, *Symposium: "The Law of the Land": The North Carolina Constitution and State Constitutional Law: The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. Rev. 1749, 1751, 1755–56 (1992). Failing to protect James, Darrell, and Riley would "diminish[ ] the identity of the state constitution as a separate legal document." Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. Cent. L. Rev. 145, 147 (2014); s*ee also People v. Bullock*, 440 Mich. 15, 31, 485 N.W.2d 866, 872 (1992) ("[A] 'significant textual difference [ ] between parallel provisions of the state and federal constitutions' may constitute a 'compelling reason' for a different and broader interpretation of the state provision." (second alteration in original)

(quoting *People v. Collins*, 438 Mich. 8, 32, 475 N.W.2d 684, 694 (1991)).[2] More importantly, it would leave James, Darrell, and Riley unprotected from sentences that give them no meaningful chance at rejoining their communities. *See Young*, 369 N.C. at 126, 794 S.E.2d at 279; *State v. Kelliher*, 849 S.E.2d 333, 350, 352 (N.C. Ct. App. 2020), *disc. rev. granted*, 854 S.E.2d 586 (N.C. 2021). This Court is free to decide for itself that such sentences are a cruel punishment for juvenile conduct, and it should do so.

a. A punishment that does not recognize children's unique vulnerability and capacity for change is cruel.

The North Carolina Constitution protects Darrell, Riley, James, and others from "cruel *or* unusual punishment" (emphasis added). N.C. Const. art. I, § 27. That language is more expansive than the United States Constitution's prohibition on "cruel and unusual punishment." *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 37 (2d ed. 2013) ("[T]hese provisions [in N.C. Const. art. I] have over the years been given specific content by the courts; indeed, they empower the state courts to provide protections going even beyond those

[2] Other state courts have applied their state constitutions' bans on excessive punishment more stringently than the Eighth Amendment. *See Bullock*, 440 Mich. at 42–43, 485 N.W.2d at 877 (relying on state constitutional ban on "cruel or unusual punishment" to invalidate mandatory life without parole for possession of over 650 grams of cocaine); *State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013) ("Finally, and related to the previous discussion, the district court should recognize that a lengthy prison sentence without the possibility of parole such as that involved in this case is appropriate, if at all, only in rare or uncommon cases."); *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014) (banning all mandatory minimum sentences for juvenile conduct, even a seven-year minimum); *see also Kelliher*, 849 S.E.2d at 345 n.11 (citing other cases in which courts have held that de facto life without parole sentences are cruel and unusual).

secured by the U.S. Constitution."). The use of the word "or" means that the prohibition on "cruel or unusual punishment" covers cruel punishments, not just punishments that are cruel and unusual. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) ("In interpreting our Constitution – as in interpreting a statute – where the meaning is clear from the words used, we will not search for a meaning elsewhere."); *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 846, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment . . . . the Cruel or Unusual Punishment clause of the North Carolina Constitution imposes at least this same duty, if not a greater duty."); *People v. Lorentzen*, 387 Mich. 167, 172, 194 N.W.2d 827, 829 (1972) ("The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition."). Accordingly, the meaning of "cruel and unusual punishment" prohibited by the Eighth Amendment should not limit the meaning of "cruel or unusual punishment." Instead, the meaning of cruel for purposes of juvenile sentencing should reflect the State's moral commitments to children and vulnerable people reflected in other provisions of the North Carolina Constitution, this Court's opinions, and the General Statutes. *Cf. Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and

property."); *Medley*, 330 N.C. at 844, 412 S.E.2d at 659 (holding that under N.C. Const. art. I, § 27, and the United States Constitution, North Carolina has a special duty to provide medical care to incarcerated persons); *Bd. of Educ. v. Bd. of Comm'rs of Granville Cnty.*, 174 N.C. 469, 93 S.E. 1001, 1002 (1917) ("[T]hese constitutional provisions were intended to establish a system of public education adequate to the needs of a great and progressive people, affording school facilities of recognized and ever–increasing merit to all the children of the state and to the full extent that our means could afford and intelligent direction accomplish.").

The North Carolina Constitution provides additional guidance on the point of punishment: "The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death . . . ." N.C. Const. art. XI, § 2. The United States Supreme Court has banned the death penalty for juvenile conduct, in part because it does not deter the conduct of children who are too immature to realize fully the consequences of their conduct. *See Roper v. Simmons*, 543 U.S. 551, 578, 161 L. Ed. 2d 1, 28 (2005). Thus, for juvenile conduct that is protected from the death penalty, a necessary part of a constitutional punishment is the opportunity for "reform" that will allow a child to pursue a law-abiding life as an adult. *See* N.C. Const. art. I, § 27.

North Carolina's constitutional promises to children include "the privilege of education." N.C. Const. art. I, § 15. As this Court held in *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997), that provision guarantees North Carolina's

children "a sound basic education" that "prepar[es] students to participate and compete in the society in which they live and work." That guarantee is a moral commitment to children's futures and echoes this Court's concern with children's capacity for growth in other cases involving juveniles. *See State v. James*, 371 N.C. 77, 94, 813 S.E.2d 195, 207 (2018) ("[S]entences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity."); *Young*, 369 N.C. at 126, 794 S.E.2d at 279 (requiring "a sufficiently meaningful opportunity to reduce the severity of the sentence to . . . something less than life imprisonment without the possibility of parole" to satisfy *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190, 193 L. Ed. 2d 599 (2016)). Just as North Carolina courts have a "duty under the North Carolina Constitution" to ensure that the State fulfills its educational commitment, *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261, they also have a duty to ensure that the State protects its other commitments to children.

As children become old enough to work, the Constitution protects their "inalienable right[] … [to] the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1; *see also* Orth & Newby, *supra*, at 46 (noting that the provision "may have been intended to strike an ideological blow at the slave labor system"); *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870, 876 (1940) (Stacy, C.J., concurring) ("The right to conduct a lawful business, or to earn a livelihood, is regarded as fundamental."). This constitutional provision reflects the importance of

investing one's time and energy into a useful occupation and enjoying the benefits of one's work. It also reflects the notion that North Carolina's citizens ought to be able to contribute to their communities through gainful employment.

The organization of North Carolina's courts reflects the State's interest in nurturing children. As this Court recognized over one hundred years ago, North Carolina established a juvenile court system to "deal with delinquent children not as criminals, but as wards." *State v. Burnett*, 179 N.C. 735, 742, 102 S.E. 711, 714 (1920). The system was meant "to give them the control and environment that may lead to their reformation, and enable them to become law-abiding and useful citizens." *Id.*

The Executive branch and General Assembly also seek to protect children. North Carolina is well known for former Governor Terry Sanford's efforts to improve schools. *See* John Drescher, *How a Courageous Southern Governor Broke Ranks with Segregationists in 1961*, Wash. Post (Jan. 1, 2021), https://www.washingtonpost.com/history/2021/01/01/terry-sanford-north-carolina-race-segregation/. The General Assembly has enacted extensive legislative protections for children, especially in the Juvenile Code in Chapter 7B of the General Statutes, which governs child protection, foster care, and adoption. The Juvenile Code is meant to protect "juveniles' needs for safety, continuity, and permanence" and "ensur[e] that the best interests of the juvenile are of paramount consideration by the court." *See* N.C.G.S. § 7B-100. The General Assembly also enacted a process for the voluntary admission of minors to mental health facilities

to help children who are "genuinely in need of the treatment." *In re P.S.*, 256 N.C. App. 215, 221, 807 S.E.2d 631, 635 (2017); *see* N.C.G.S. § 122C-221. Other parts of the General Statutes provide for social services, public assistance programs, regulations of daycare, and regulations of child support. N.C.G.S. §§ 108A-1, 108A-25, 110-85, 110-129. These provisions reflect American society's "special concern for children." *Kent v. United States*, 383 U.S. 541, 554, 16 L. Ed. 2d 84, 94 (1966).

The General Assembly and the judicial branch continue to show that special concern for children. In September 2015, former Chief Justice Martin established the North Carolina Commission on the Administration of Law and Justice, which later issued a report that emphasized the still-developing nature of adolescents' brains and the corollary "that adolescents are less culpable than adults." N.C. Comm'n on the Admin. of L. & Just., Crim. Investigation & Adjudication Rep. App. A, at 16 (Dec. 2016), https://www.nccourts.gov/commissions/north-carolina-commission-on-the-administration-of-law-and-justice (select "Read the Final Report" and then "Appendix A"). In 2019, the General Assembly passed the Juvenile Justice Reinvestment Act, which allows juveniles more opportunities to remain in the juvenile justice system and out of the adult court system, and increased the Juvenile Justice division's budget by $43 million. Virginia Bridges, *How 'Raise the Age' Helped Thousands of North Carolina Teens This Year*, News & Observer (Dec. 29, 2020), https://www.newsobserver.com/news/local/crime/article248023695.html. The judicial and legislative branches' efforts to better care for children reflect our State Constitution's concern for children's vulnerability and capacity for growth.

Collectively, the Constitution's prohibition on cruel or unusual punishment, its provisions for education and employment, and the General Assembly's protections for children reflect a constitutional norm of valuing children, giving them a meaningful chance at participating in the community through employment when they become adults, and protecting them from punishment that is inconsistent with their capacity for growth, or even impedes it. N.C. Const. art. I, §§ 1, 15, 27; N.C. Const. art. XI, § 2; *cf. Corum*, 330 N.C. at 783, 413 S.E.2d at 290 ("We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property."); *Bd. of Educ.*, 174 N.C. 469, 93 S.E. at 1002 (recognizing goal of "affording school facilities of recognized and ever–increasing merit to all the children of the state"). Punishments that are repugnant to that norm are cruel.

The *Kelliher* Court and Chief Judge McGee in dissent in *Anderson* and *Conner* correctly focused on whether sentences of more than twenty-five years before parole eligibility reflected children's unique vulnerability and capacity for change. *State v. Kelliher*, 849 S.E.2d at 350; *Anderson*, 853 S.E.2d at 802 (McGee, C.J., dissenting); *Conner*, 853 S.E.2d at 834 (McGee, C.J., dissenting). Although *Kelliher* and Chief Judge McGee's dissents did not consider the North Carolina Constitution in depth, their judgment about the meaning of the stricter United States Constitution still holds true for the more expansive North Carolina Constitution: "[J]uvenile homicide offenders who are neither incorrigible nor

irreparably corrupt, are–like other juvenile offenders–so distinct in their immaturity, vulnerability, and malleability as to be" protected from any sentence with the same practical effect as life without parole. *Kelliher*, 849 S.E.2d at 344.

b. *Green* does not provide a compelling reason to treat the United States and North Carolina Constitutions' bans on excessive punishment as the same.

State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998), does not give a compelling reason for treating the two constitutional provisions as equivalent. *Green* upheld a mandatory life without parole sentence imposed on a juvenile that would have been invalid under *Miller* and this Court's subsequent opinions on excessive punishments for juveniles. *See id.* at 603, 502 S.E.2d at 828; *Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430*; see, e.g., Young*, 369 N.C. at 126, 794 S.E.2d at 279. This Court decided *Green* at a time when the "protection of law-abiding citizens from their predators, regardless of the predators' ages, [was] on the ascendancy in our state and nation." *Green*, 348 N.C. at 608, 502 S.E.2d at 831. *Green*'s language of treating juvenile "predators . . . more severely" than before is incongruent with this Court's post-*Miller* jurisprudence and evolving understandings of child development. *See Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430*; Young*, 369 N.C. at 126, 794 S.E.2d at 279; *see also The Superpredator Myth, 25 Years Later*, Equal Just. Initiative (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/ (noting that original proponents of the "superpredator myth" have changed their position and signed an amicus brief in support of the juveniles in *Miller*). Moreover, at the time of *Green*, neither the United States Supreme Court nor this Court had invalidated a mandatory life without parole sentence for juvenile

conduct, a death sentence for juvenile conduct, or a death sentence for conduct by someone with intellectual disabilities. *See Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430; *Roper*, 543 U.S. at 578, 161 L. Ed. 2d at 28; *Atkins v. Virginia*, 536 U.S. 304, 321, 153 L. Ed. 2d 335, 350 (2002). Any of those outcomes would be cruel today. An opinion predating those new understandings of what is cruel is not useful for understanding the scope of the North Carolina Constitution.

c. Darrell, Riley, and James illustrate the ways in which children are vulnerable and capable of change.

Darrell, Riley, and James are exactly the kind of children–now adults incarcerated for juvenile conduct–that the North Carolina Constitution should protect. Each was vulnerable. Each was not protected from his environment. And each has shown immense capacity for change.[3]

i. Darrell's, Riley's, and James's conduct arose out of impoverished childhood environments, early exposure to drugs, and difficulties with mental illness and cognitive impairments.

The stories of Darrell, Riley, and James show just how vulnerable children are to their environments. James had a physically abusive father. (Kelliher T p 45). He was in enough despair to attempt suicide as a ten-year-old (and again as a seventeen- and eighteen-year-old). (Kelliher Def.'s Ex. 1). Darrell lived in a home where his father choked him when he was five years old and attacked him and his

[3] By ordering life with parole sentences, the trial courts recognized that Darrell, Riley, and James are redeemable. *See James*, 371 N.C. at 95, 813 S.E.2d at 208. Thus, the question is not whether they were redeemable as juveniles, but whether their sentences are congruent with their status as redeemable people who were vulnerable to dangerous environments but were (and are) capable of growth.

mother with an axe, after trying to run over his mother with a car. (Anderson T pp 22–23, 32). Darrell left school in the seventh grade with a third grading reading level. (Anderson R p 71). Riley lived in a neighborhood that his aunt described as "the pits of hell"; his mother said that drug activity was impossible to avoid there. (Riley T pp 38, 79). Neither one of his parents was a consistent part of his life, and when he was six the Department of Social Services removed him from his parents' custody because of their drug use and placed him with his grandparents. Riley then moved between households so that there was "no stability in his life as to where he was living and where he could call home." (Conner T pp 39, 45, 150–58).

Early exposure to drugs compounded the effects of Darrell's, Riley's, and James's already horrific environments. James began drinking when he was thirteen years old. When he was seventeen years old, he used ecstasy, acid, psilocybin, cocaine, marijuana, and alcohol. (Kelliher T pp 46–47). Darrell began drinking when he was seven years old. By his seventeenth birthday, he was using crack cocaine (with his father), cocaine powder, and ecstasy. (Anderson T pp 26–30); (Anderson Def.'s Ex. A p 27). Similarly, Riley began using marijuana when he was nine years old, began drinking daily and taking Xanax starting at age eleven, and became addicted to heroin, opiates, and methadone that his older cousin sold him. (Conner T pp 118–21). Riley had chronic frontal lobe epilepsy, causing seizures so severe that he broke a hospital bed. (Conner T pp 114–16, 159, 167). The substance abuse all occurred in environments in which any child would have wanted, as Riley

bluntly described, "[t]o get away from all the bullshit that rained down every day." (Conner Def.'s Ex. 17, § 9).

Darrell's and Riley's poverty exacerbated their childhood vulnerabilities. Darrell's family had difficulty paying for utilities and relied on food stamps. (Anderson T pp 21–22). Riley was living without parental or other stable support by the time he was fourteen. (Conner T pp 155–56). Poverty and criminal convictions are correlated: "[B]oys from families in the lowest 10 percent [of the income distribution] are almost 20 times more likely to be incarcerated compared to boys from the top 10 percent." Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Brooking Inst. 12 (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf. Extreme poverty is even more correlated to criminal convictions: "[B]oys from families [in the lowest one percent of family incomes] are 40 times more likely to end up in prison compared to boys from the richest families." *Id.* (And poverty is not distributed on a race-neutral basis. *See* Alexandra Sirota, *2019 Poverty Report*, N.C. Just. Ctr. 4 (2019), https://www.ncjustice.org/wp-content/uploads/2019/12/BTC-POVERTY-report-2019-final.pdf). As children in poverty, Darrell and Riley never had fair odds of avoiding prison.

Poor children are more likely to be incarcerated not because they are innately depraved, but because poverty devastates families. *See* Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36

Hofstra L. Rev. 835, 865–66 (2008). Parents who would do better under other circumstances "shoulder the enormous additional burdens that poverty places on them" and, therefore, "may be unable to properly nurture and care for their children." *Id.* at 866. Parents in poverty (and out of poverty) may commit extreme physical abuse, which surely includes being assaulted with an axe as a child as Darrell was. (Anderson T p 32). Such abuse "undermine[s] normal social and emotional development, often create[s] lifelong psychological problems, produce[s] deep insecurities, and can lead to diagnosable psychiatric disorders." Haney, *supra*, at 869. If juveniles use substances because no one has given them a better way to deal with dangerous, unstable environments, they will have to overcome the resulting neurological damage. *See* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 456–57 (2013). When children are subjected to the extreme stress that Darrell, Riley, and James experienced, it is not surprising if they "adopt dysfunctional coping mechanisms that prove to be damaging and disruptive later in life." Haney, *supra*, at 872. (Because of juveniles' capacity for growth, it is also not surprising that they can overcome their early environments if given more stable settings. Crim. Investigation & Adjudication Rep. App. A, at 16.) Sentences for juvenile conduct ought to account for the link between children's environment and their later conduct, not ignore it.

ii. Darrell's, Riley's, and James's crimes reflected their inabilities as juveniles to control their impulses.

The crimes at issue here reflected reckless and impulsive behavior. Two of the offenses here began as robberies, like the cases in *Miller*, 567 U.S. at 465, 468, 183 L. Ed. 2d at 415, 416. Darrell participated in a robbery with a cousin who was seven years older.[4] James participated in a robbery with another seventeen-year-old, Joshua Ballard, who also would have struggled to control his impulses.[5] Riley's crime occurred in the context of worsening epilepsy and using marijuana and PCP on the morning of the crime. (Conner T pp 122, 164, 186). The crimes caused deaths and great suffering to the victims' families, and Darrell, Riley, and James recognized that. As James said, "The depth of my sorrow and regret cannot … alter the finality … nor … alleviate the past pain that [the victims'] absence has caused." (Kelliher T p 101). He also said, "Daily I strive to change, to make the right decisions, to promote positive pro social actions in others." (Kelliher T p 101). Riley said, "I know that no amount of words will ever be able to make up for the life that was lost or will they bring that person back, but I would still like to say how sorry I truly am." (Conner T p 188). Darrell's apology was so powerful that the trial court called it "one of the most powerful things I've ever heard." (Anderson T p 63).

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[4] Darrell's codefendant pled to two counts of second-degree murder and is scheduled to leave North Carolina prison in 2028. Offender Public Information for Eddie L. Neely Jr., N.C. Dep't of Pub. Safety, https://webapps.doc.state.nc.us/opi/offendersearch.do?method=view (last visited Apr. 28, 2021) (search for offender number 0520821).

[5] Joshua Ballard went to trial twice; the jury acquitted him at the second trial. (Kelliher T p 5–6).

iii. Darrell's, Riley's, and James's subsequent conduct shows their capacity for change.

Following their convictions, Darrell, Riley, and James all exemplified juveniles' capacity for rehabilitation and growth. In addition to apologizing, all of them also chose to pursue better lives. James was selected for a ministry program that chose 26 students out of 1300 eligible participants. (Kelliher T p 63). He also obtained his GED and studied Spanish and ministry. (Kelliher T p 46). When a pastor who had known James for seventeen years was asked if he was redeemable, the pastor said, "Oh, good grief, yes, of course." (Kelliher T p 89). Darrell obtained his GED, studied upholstery and custodial management, and wrote motivational books for children. (Anderson T pp 38–39); (Anderson Def.'s Ex. A pp 4–15). Riley had few enough infractions that he was in the lowest level of custody in pretrial detention and studied for his GED. (Conner T pp 146, 193–95). As he spent more time in a stable environment, he also showed increased responsibility, maturity, and capacity for forming meaningful relationships. (Conner T pp 112–13). As James, Darrell, and Riley all show, "children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 577 U.S. 190, 212, 193 L. Ed. 2d 599, 622 (2016).

The North Carolina Constitution's and General Statutes' provisions for children ought to have prevented or mitigated the poverty, drug abuse, mental illness, and violence that James, Darrell, and Riley endured. Where were the State's mental health services for children when James tried to kill himself as a ten-year-old? (Kelliher Def.'s Ex. 1). Where was the public school system when Darrell left

school in the seventh grade with a third grading reading level? (Anderson R p 71). Where was the Department of Social Services after Riley's removal from his parents' home and placement in his grandparents' home lead to even more instability in his life? (Conner T pp 150–58). The State of North Carolina failed Darrell, Riley, and James at these and other critical moments, when their childhoods were the opposite of the safe, nurturing environments that the State hopes to provide through education and social services.

As these three cases show, the State does not always reach the children who most need help and can change, and some of them commit violent crimes. They should not become permanent social outcasts. *See Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430*; Young*, 369 N.C. at 126, 794 S.E.2d at 279. In their efforts at educating and rehabilitating themselves, Darrell, Riley, and James show that even people incarcerated for violent crimes improve themselves and hope to enjoy the fruits of their labors. For their punishments to be constitutional, the punishments must comport with the constitutional values of protecting vulnerable children so that they have a meaningful chance to participate in their communities as adults. *See* N.C. Const. art. I, §§ 1, 15, 27; N.C. Const. art. XI, § 2.

d. <u>The sentences at issue here are not common, but they affect a significant number of incarcerated persons who deserve protection.</u>

Among North Carolina's tens of thousands of incarcerated persons, 527 had to serve or will have to serve more than 25 years until they are eligible for parole. Ben Finholt, *NC Supreme Court to Take on 3 Juvenile Life with Parole Cases in Coming Months*, Wilson Ctr. for Sci. & Justice Blog (May 6, 2021),

https://wcsj.law.duke.edu/2021/05/nc-supreme-court-to-take-on-3-juvenile-life-with-parole-cases-in-coming-months/. People serving time for juvenile conduct are a small minority of the group: "And of those 527, there are 51 people who must serve more than 25 years imprisonment before parole consideration for crimes they committed as juveniles." *Id.* Those fifty-one people "will serve, on average, 37.8 years before they become eligible for parole." *Id.*

What this means is that fifty-one people incarcerated for juvenile conduct are redeemable enough in the eyes of the courts and the General Assembly that they are parole eligible. *See James*, 371 N.C. at 94, 813 S.E.2d at 207 ("[S]entences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity."). Nonetheless, they will have to spend decades in prison before even getting the chance at release. The stories above show the vulnerability and capacity for change that characterize many children who are convicted of serious crimes. *See* Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, The Sentencing Project 2–3 (Mar. 2012), https://www.sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf (summarizing the "high levels of exposure to violence[,]" "significant social and economic disadvantages[,]" and "significant educational challenges" faced by juveniles who received sentences of life without parole); Haney, *supra*, at 865–66 (2008). Darrell, Riley, James, and others sentenced for conduct as redeemable juveniles should have sentences reflecting the nature of their childhoods and potential as adults, but they do not. *See*

James, 371 N.C. at 94, 813 S.E.2d at 207; *Young*, 369 N.C. at 126, 794 S.E.2d at 279. Lower courts need clear instruction that redeemable juveniles are protected from de facto life without parole sentences; otherwise, too many people will continue to receive unconstitutional and cruel sentences. If this Court acts now, however, the number of cases involving sentences of more than twenty-five years to parole eligibility is not so high that correcting the sentences will be unworkable.

II. DARRELL, RILEY, AND JAMES RECEIVED CONSECUTIVE SENTENCES THAT DO NOT RECOGNIZE THEIR VULNERABILITY OR CAPACITY FOR CHANGE.

The Court of Appeals correctly struck down James's consecutive sentences because they do not recognize his vulnerability or capacity for change. If this Court reverses the Court of Appeals, then James will not be eligible for parole until he is sixty-seven. *State v. Kelliher*, 849 S.E.2d 333, 335 (N.C. Ct. App. 2020), *disc. rev. granted*, 854 S.E.2d 586 (N.C. 2021). Currently, Darrell will not be eligible for parole until he is sixty-seven; Riley will not be eligible for parole until he is sixty to sixty-nine years old. *State v. Anderson*, 853 S.E.2d 797, 798 (N.C. Ct. App. 2020), *notice of appeal filed*, No. 23A21 (N.C. Feb. 4, 2021); *State v. Conner*, 853 S.E.2d 824, 824 (N.C. Ct. App. 2020), *notice of appeal filed*, No. 64A21 (N.C. Feb. 4, 2021). Their sentences violate the North Carolina Constitution.

a. <u>The sentences at issue will keep Darrell, Riley, and James imprisoned past a reasonable life expectancy for someone who is incarcerated.</u>

If Darrell, Riley, and James serve out the sentences that the trial courts imposed, there is a significant chance that they will not survive to become parole eligible. Each of them will spend decades in prison, where they face "high levels of

violence and communicable diseases, poor diets, and shoddy health care." Nick Straley, Miller's *Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L. Rev. 963, 986 n.142 (2014). Each year in prison reduces their life expectancy by two years. *Id.*; *see also Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* 2, http://www.lb7.uscourts.gov/documents/17-12441.pdf (last visited 16 March 2021) (noting that juveniles serving natural life sentences in Michigan have an average life expectancy of 50.6 years). If they experience symptoms of mental illness and are put into isolation as a result (or vice versa), which is not unusual in prison, they run the risk of receiving inadequate medical attention and being "left in [a] cell for days during a psychosomatic episode, handcuffed and covered in feces." Kari Travis, *Problems at N.C. Prisons Have Festered for Years*, Carolina J. (Feb. 12, 2018), https://www.carolinajournal.com/news-article/problems-at-n-c-prisons-have-festered-for-years/. While in prison, they are also uniquely susceptible to public health crises such as the pandemic. Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. Times (Apr. 10, 2021), https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html; Jordan Wilkie, *Judge: Prison Conditions During Pandemic Likely Unconstitutional*, Carolina Public Press (June 9, 2020), https://carolinapublicpress.org/30619/judge-prison-conditions-during-pandemic-likely-unconstitutional/ ("Judge Vinston Rozier Jr. of Wake County Superior Court ruled Monday that the conditions inside North Carolina's prisons were likely

unconstitutional due to the state's failure to provide substantial testing for COVID-19 to people in its prisons and for not following public health guidelines for limiting the spread of disease."). In short, Darrell, Riley, and James entered prison as vulnerable youth. As adults, they remain in a system that will make them die sooner and have no meaningful hope of leaving prison alive without judicial relief.

The Court of Appeals erred in *Anderson* and *Conner* in relying on actuarial tables that do not account for the health consequences of prison. *See Anderson*, 853 S.E.2d at 798; *Conner*, 853 S.E.2d at 825. The life expectancy of 50.6 years from the Michigan study is at least a decade less than Darrell's, Riley's, or James's age when they become parole eligible. Sentences that are inconsistent with any realistic life expectancy are not a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75, 176 L. Ed. 2d 825, 846 (2010); *see also Casiano v. Comm'r of Correction*, 317 Conn. 52, 78, 115 A.3d 1031, 1046 (2015) ("Such evidence [of diminished life expectancy] suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom.").

Sentences that give no meaningful chance for release can make anyone despair. One man who pled to second-degree murder committed as a seventeen-year-old "received a total active sentence of 92 years in prison. [He] hanged himself in prison in 2003 after serving three years." *State v. Dudley*, 265 N.C. App. 382, 826 S.E.2d 860 (2019) (unpublished) (per curiam). Parole eligibility in one's sixties also would feel like "forfeiture that is irrevocable." *Graham*, 560 U.S. at 69, 176 L. Ed.

2d at 842. Through no fault of their own, adults who had traumatic childhoods are especially ill-equipped to consider such a crushing situation. *See* Haney, *supra*, at 865–67 (explaining how poverty causes long-term psychological harm to children). Darrell, Riley, and James should not have sentences inducing such despair.

b. Making someone parole eligible in his sixties is not a meaningful chance at reintegration into the community.

If someone does reach parole eligibility in his sixties, he will not have a meaningful chance at finding stable employment or housing. That is typically the age range for retirement, not beginning one's life as an independent adult. *See United States v. Grant*, 887 F.3d 131,151 (3d Cir. 2018) (noting that "the national age of retirement to date is between sixty-two and sixty-seven inclusive"), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3rd Cir. 2018). Although finding a job after leaving prison is difficult at any age, people leaving prison earlier in life have better chances. Bruce Western et al., *Stress and Hardship After Prison* 25 (Oct. 2014), https://scholar.harvard.edu/files/brucewestern/files/trans08.pdf (reporting that 56% of 30-to 44-year-olds in one cohort of people who had left prison six months before were employed compared to 46.4% of people over 44); *see also* Kelly Elizabeth Orians, *"I'll Say I'm Home, I Won't Say I'm Free": Persistent Barriers to Housing, Employment, and Financial Security for Formerly Incarcerated People in Low-Income Communities of Color*, 25 Nat'l Black L. J. 23, 25–26 (2016) ("[R]esearch has also found dramatic unemployment rates amongst formerly incarcerated people, in some cases as high as 77 percent after the first year of release." (citations omitted)). Even for formerly incarcerated persons who can find a job, wages are low. Jeffrey D.

Morenoff & David J. Harding, *Final Technical Report: Neighborhoods, Recidivism, and Employment Among Returning Prisoners* 9 (Nov. 2011), https://www.ojp.gov/pdffiles1/nij/grants/236436.pdf ("In the initial quarter after release, 92.5 percent of employed former prisoners were earning incomes below the poverty line, and although this rate declined slightly during the first six quarters after release, it remained relatively flat for the remainder of the observation period and never dropped below 80 percent."). Finding housing is also difficult for people leaving prison; it gets harder to find with age. *See* Western, *supra*, at 21 (reporting that in one study of people leaving prison, among 30- to 44-year-olds, 31.4% of 30- to 44-year-olds were in marginal temporary housing six months after leaving prison compared to 53.6% of people over 44). Putting James, Darrell, and Riley in a position that will make it so hard from them to have employment and housing as rehabilitated adults is cruel.

Trying to establish or maintain healthy relationships in one's sixties after decades of incarceration would be equally challenging. Incarceration makes it more difficult to maintain one's family relationships during and after incarceration:

> Unfortunately, logistical and legal constraints–such as housing restrictions and distance from the prisoner's community to that of their family–prevent some family members from providing support to the recently released prisoner. Damaged family relationships prior to incarceration, sporadic communication while in prison, and a fear of return to negative behaviors upon release also may prevent family members from having a relationship with released inmates.

Nancy La Vigne et al., *Release Planning for Successful Reentry*, Urban Inst. 22 (Sept. 2008), https://www.urban.org/sites/default/files/publication/32056/411767-

Release-Planning-for-Successful-Reentry.PDF. Forming any social ties can be challenging after a long sentence. As one fifty-nine-year-old man recently released from prison after a fifteen-year sentence reported, he had "difficulty reconnecting with the community" and said that "his attempts at socializing felt like homework." Western, *supra*, at 35. The combination of housing, employment, familial, and social difficulties is most damaging for "older [people] and those with histories of addiction and mental illness." *Id.* at 38. People in those categories—which will include Darrell, Riley, and James if they serve consecutive sentences—"received less support from family, were more likely to be insecurely housed or outside of regular households, and were less likely to be employed." *Id.* Sentences that impose those hardships on James, Darrell, and Riley are cruel.

The intersection of age, reentry difficulties, and North Carolina's parole system will compound the cruelty of sentences providing parole eligibility dates that are already past the life expectancy of Darrell, Riley, and James. The North Carolina Parole Commission considers a person's likelihood of reentering the community successfully and avoiding future offenses when deciding who receives parole. *See* N.C.G.S. § 15A-1371(d). The Parole Commission has no obligation to release anyone on parole, and their decisions are final. *State v. May*, 225 N.C. App. 119, 131, 804 S.E.2d 584, 591 (2017) (Stroud, J., concurring). Because longer sentences make it harder to find a job, housing, and a stable social network, the consecutive sentences at issue here make it more likely that the Commission will deny James, Darrell, or Riley parole, and they will not be able to appeal that

decision. Being given parole eligibility but then turned down for parole because of reentry difficulties–that are a predictable consequence of the consecutive sentences at issue here–would make a parole eligibility date especially arbitrary and futile. The State is again setting James, Darrell, and Riley up to fail, and that is cruel.

III. CAPPING SENTENCES FOR REDEEMABLE JUVENILES AT TWENTY-FIVE YEARS UNTIL PAROLE ELIGIBILITY SATISFIES THE NORTH CAROLINA AND UNITED STATES CONSTITUTIONS.

Kelliher's remedy of capping aggregate sentence lengths under the *Miller*-fix statute at twenty-five years to parole eligibility satisfies the North Carolina Constitution. *State v. Kelliher*, 849 S.E.2d 333, 352 (N.C. Ct. App. 2020), *disc. rev. granted*, 854 S.E.2d 586 (N.C. 2021).

The *Miller*-fix statute illustrates why a cap of twenty-five years to parole eligibility is appropriate. Under the statute, "If the sole basis for conviction of a count *or each count* of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole." N.C.G.S. § 15A-1340.19B (emphasis added). In other words, even a person convicted of multiple counts of felony murder will be eligible for parole after twenty-five years of incarceration. This reflects the General Assembly's considered judgment that twenty-five years of incarceration is enough incarceration, even in cases where a person is responsible for multiple deaths. The General Assembly did not set sentences based on the sentencing judge's concern in Darrell's case that concurrent sentences would suggest a lower valuation of multiple victims' lives. (Anderson T p 65). Instead, in a bill that passed with 95% approval in the House and 78% approval

in the Senate, the General Assembly required a sentence for multiple counts of felony murder that gives a meaningful chance at release. *See Senate Bill 635*, N.C. General Assemb., https://ncleg.gov/BillLookUp/2011/S635 (last visited May 6, 2021). The General Assembly recognized that while crimes may differ, redeemable children's vulnerability and malleability do not. Therefore, sentences for juvenile conduct should reflect those common characteristics, even if the crimes are different. *Miller v. Alabama*, 567 U.S. 460, 473, 183 L. Ed. 2d 407, 420 (2012) ("But none of what [*Graham*] said about children--about their distinctive (and transitory) mental traits and environmental vulnerabilities--is crime-specific."); Model Penal Code: Sentencing § 6.11A(g) (Am. Law. Inst., Proposed Final Draft 2017, Approved May 2017) ("No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses [by juveniles]."). James, Darrell, Riley, and other youths protected by the North Carolina and United States Constitutions should all have sentences reflecting their common characteristics. Upholding the Court of Appeals' decision in *Kelliher*, and vacating the decisions in *Anderson* and *Conner*, would ensure that James, Darrell, and Riley have sentences that follow the North Carolina and United States Constitutions.

CONCLUSION

To have a "hope of restoration[,]" *Graham v. Florida*, 560 U.S. 48, 70, 176 L. Ed. 2d 825, 842 (2010), Darrell, Riley, and James need more than a meaningless parole eligibility date. Instead, they must be parole eligible at a time when they reasonably could expect to work, reintegrate into their families (if doing so is

healthy) or form new families, and contribute to the community. *See* N.C. Const. art. I, §§ 1, 15, 27; N.C. Const. art. XI, § 2.

Because the North Carolina Advocates for Justice focus on protecting the rights of North Carolinians, and because the North Carolina Constitution by itself requires granting the requested relief, this brief has focused on the North Carolina Constitution. However, the Advocates adopt the arguments in favor of granting relief under the Eighth Amendment put forth by James, Darrell, and Riley. As they explain with respect to the Eighth Amendment, making them parole eligible in their sixties is not a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 846.

In applying *Graham* and its progeny, this Court and other courts have focused on children's unique vulnerability and capacity for change. *State v. James*, 371 N.C. 77, 94, 813 S.E.2d 195, 207 (2018) (noting "the United States Supreme Court's statements in *Miller* and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity"); *State v. Young*, 369 N.C. 118, 125, 794 S.E.2d 274, 279 (2016) (noting "the central concern of *Miller*–that a sentencing court cannot treat minors like adults when imposing a sentence of life imprisonment without the possibility of parole"). North Carolina has a history of protecting children, and now is not the time to abandon them.

The Advocates for Justice urge this Court to continue North Carolina's tradition of caring for vulnerable children by holding that the North Carolina and United States Constitutions prohibit de facto life without parole sentences that prevent Darrell Anderson, Riley Conner, and James Kelliher from having a meaningful chance at release or reentry into the community.

Respectfully submitted, this the 7th day of May, 2021.

NORTH CAROLINA ADVOCATES FOR JUSTICE

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N.C. R. App. P. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I have filed the original Brief of *Amicus Curiae* North Carolina Advocates for Justice pursuant to Rule 26 by electronic means with the North Carolina Court of Appeals.

I further hereby certify that I have served a copy of the brief pursuant to Rule 26 by email upon the following attorneys:

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This the 7th day of May, 2021.

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No. 23A21, 64A21, 442PA20 DISTRICTS 22B, 13A, 12

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Davidson County
	)	
DARRELL TRISTAN ANDERSON	)	
	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Columbus County
	)	
RILEY DAWSON CONNER	)	
	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
JAMES RYAN KELLIHER	)	
	)	
	)	

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APPENDIX TO BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE

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State v. Dudley

Court of Appeals of North Carolina

April 11, 2019, Heard in the Court of Appeals; May 7, 2019, Filed

No. COA18-1121

Reporter
2019 N.C. App. LEXIS 407 *; 265 N.C. App. 382; 826 S.E.2d 860; 2019 WL 1998807

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY DUDLEY

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Prior History: [*1] Guilford County, No. 99 CRS 110602.

State v. Dudley, 151 N.C. App. 711, 566 S.E.2d 843, 2002 N.C. App. LEXIS 888 (Aug. 6, 2002)

Disposition: AFFIRMED.

Counsel: Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

Judges: Panel consisting of Judges DIETZ, TYSON, and ZACHARY.

Opinion

Appeal by defendant from judgment entered 4 June 2018 by Judge Paul L. Jones in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2019.

PER CURIAM.

Michael Anthony Dudley ("Defendant") appeals from resentencing order entered upon remand from this Court. We affirm.

I. Background

The State's evidence tended to show that Defendant, his brother DeAndre Dudley ("DeAndre"), and DeAndre's friend, Robert Adams ("Adams"), conspired to rob drug dealers in pursuit of cash, drugs, and other items of value. During the robbery, DeAndre carried a shotgun and held the two victims, while Defendant searched upstairs for something of value to take. While Defendant searched upstairs, Adams shot both victims. Eric Fowler died from a single gunshot wound in the

buttocks. Adonnis Whitfield was shot in the leg and received medical treatment.

The shooter, Adams, was 17 years old at the time **[*2]** and pled guilty to second-degree murder and other offenses. He received a total active sentence of 92 years in prison. Adams hanged himself in prison in 2003 after serving three years. DeAndre, Defendant's older brother, was also 17 years old at the time of the murder. DeAndre's charges were pending when Defendant went to trial. The prosecution offered Defendant a plea to second-degree murder, conditioned upon him testifying against DeAndre. Defendant was 16 years old and refused to accept the plea and testify against DeAndre. The jury found Defendant guilty of first-degree felony murder. The trial court sentenced him to life in prison without parole. In addition, Defendant received 42-60 months for the combined robbery charges; 42-60 months for burglary; and 17-30 months for assault, all to run concurrently with his life sentence without parole.

Defendant appealed his original judgment and sentence. On 6 August 2002, this Court found no error except that it ordered the judgment and sentence for burglary be arrested because the sentence had served as the basis for the felony murder conviction. Defendant filed a motion for appropriate relief in 2011, arguing that a sentence of life without **[*3]** parole violated his constitutional protections under *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The superior court denied his motion. This Court subsequently denied a petition for writ of certiorari.

On 12 December 2012, Defendant filed a second motion for appropriate relief relying on the Supreme Court of the United States' decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The superior court denied his motion, finding that *Miller* could not be applied retroactively. Defendant filed a second petition for writ of certiorari. On 6 February 2017, this Court granted the petition and remanded the case for resentencing. The superior court resentenced Defendant to life with parole on 4 June 2018, in accordance with N.C. Gen. Stat. § 15A-1340.19B(a)(1). Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from a final judgment of a superior court. N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant asserts that the sentence imposed in superior court violates the Eighth Amendment of the Constitution of the United States and Article I, Section 27 of the North Carolina Constitution. Defendant argues that this case should be remanded for an explicit ruling on his as-applied proportionality challenge. We disagree and affirm.

IV. Analysis

A. State v. Seam

Since Defendant filed his appeal, this Court unanimously decided State v. Seam, N.C. App. , 823 S.E.2d 605 (2018). Defendant acknowledges the legal issues in *Seam* mirror those in his case and **[*4]** has conceded *Seam* is controlling authority.

In *Seam*, a grand jury "indicted [the] [d]efendant for first-degree murder and attempted robbery with a dangerous weapon." Seam, N.C. App. at , 823 S.E 2d at 608. At the time the offense occurred, the defendant was a juvenile. At his first sentencing hearing, the defendant received a "sentence of life imprisonment without the possibility of parole. . . .Defendant appealed to this court and [this Court] upheld his conviction." Id. at , 823 S.E.2d at 607.

The defendant filed a motion for appropriate relief

and this Court found his sentence was unconstitutional in light of *Miller*. *Id.* Ultimately, the defendant received a resentencing order to "life imprisonment with the possibility of parole." Id. at , 823 S.E.2d at 608. The defendant in *Seam* challenged the constitutionality of this sentence on appeal. This Court concluded "[d]efendant's sentence of life imprisonment with the possibility of parole" was constitutional and remand was unnecessary. Id. at , 823 S.E.2d at 608.

B. Defendant's Stipulation

Like the defendant in *Seam*, Defendant committed first-degree felony murder as a juvenile and was sentenced appropriately upon remand to life with parole, in light of *Miller* and the revised North Carolina sentencing scheme. N.C. Gen. Stat. § 15A-1340.19B(a)(1). Defendant acknowledged that the "legal **[*5]** issues in Mr. Seam's case and this case are essentially identical."

Additionally, Defendant argues an "as-applied" challenge. N.C. Gen. Stat. § 15A-1340.19B(a)(1). However, in *Seam*, the defendant's counsel, as here, brought and asserted the same "as-applied" constitutional challenge, and this Court held that remand was unnecessary. Seam, N.C. App. at , 823 S.E.2d at 612.

Furthermore, Defendant has stipulated to the applicability of *Seam* as controlling precedent. This Court is "bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Following *State v. Seam*, Defendant's sentence of life with parole is constitutional. *Seam* forecloses all issues on appeal. *See id.*

Being bound by *Seam*, this Court recognizes Defendant "is limited solely to a review of whether his sentence was grossly disproportionate to his crime." Seam, N.C. App. at , 823 S.E.2d at 610. Here, as in *Seam*, Defendant's sentence of life with the possibility of parole is not grossly disproportionate to his crime of first-degree murder because it complies with the legislative sentencing scheme in N.C. Gen. Stat. §15A-1340.19A. The North Carolina General Assembly revised the sentencing statute to comply with *Miller*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407.

This Court is **[*6]** bound by precedent as set forth by *Seam* and by legislative deference. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Defendant's sentence is consistent with *Miller* and the proportionality principle of the Eighth Amendment. *Miller*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407. Defendant is eligible to be considered for parole after serving 25 years of imprisonment. N.C. Gen. Stat. § 15A-1340.19A.

V. Conclusion

Defendant stipulated his appeal is governed by this Court's precedent in *State v. Seam*. Further, Defendant's sentence is wholly consistent with the legislative sentencing scheme in N.C. Gen. Stat. § 15A-1340.19A. For the reasons stated above, we affirm Defendant's sentence. *It is so ordered.*

AFFIRMED.

Panel consisting of Judges DIETZ, TYSON, and ZACHARY.
